Supreme Court, U. S.
FILED
MAY 15 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-1603

KENIL K. GOSS,

Plaintiff-Petitioner Pro Se,

vs.

REVLON, INC. and Its Wholly Owned Subsidiary, USV PHARMACEUTICAL CORPORATION,

Defendants-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DAVID GREENE
Attorney for Defendants-Respondents
540 Madison Avenue
New York, New York 10022
(212) 832-7979

MARTIN C. GREENE
Of Counsel

2227 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 840-9494 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

In The

Supreme Court of the United States

October Term, 1978

No. 78-1603

KENIL K. GOSS,

Plaintiff-Petitioner Pro Se,

vs.

REVLON, INC. and Its Wholly Owned Subsidiary, USV PHARMACEUTICAL CORPORATION,

Defendants-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

Plaintiff appealed from the order of the United States District Court, Southern District of New York (Honorable Marvin E. Frankel) granting defendants' motion for summary judgment dismissing the complaint herein. The United States Court of Appeals for the Second Circuit affirmed the judgment of the district court on the opinion of Judge Frankel dated May 19, 1978 (Appendix B, 6a-7a).*

* Numerical pages "—a" refer to Appendix to Petition for Certiorari.

The district court had granted defendants' motion for summary judgment since plaintiff's claim for racial discrimination under 42 U.S.C. §1981 was time-barred by the applicable three year statute of limitations, as set forth in Rule 214(2) of New York Civil Practice Laws and Rules. Furthermore, the New York three year statute of limitations was not tolled by plaintiff's filing of a claim with the Equal Employment Opportunity Commission (EEOC) (Appendix E, 10a-12a).

A petition for rehearing was denied by the Second Circuit on January 22, 1979 (Appendix C, 8a).

STATEMENT

The summons and complaint were served upon defendants on or about December 15, 1977. Plaintiff asserted claims as an individual and on behalf of a class pursuant to Civil Rights Act of 1866, 42 U.S.C. §1981 for racial discrimination. Defendants' answer denied the material allegations of the complaint and asserted the statute of limitations as an affirmative defense.

Plaintiff was employed by defendant USV Pharmaceutical Corporation (USV) on April 14, 1967, as an Operation Auditor at a salary of $11,000 per annum. Plaintiff received a number of salary increases and thereafter was promoted to a Staff Assistant on December 1, 1971, assigned to USV International Finance Division at a salary of $16,500 per annum. On March 7, 1972, plaintiff's employment was terminated.

On March 20, 1973, plaintiff filed charges of employment discrimination with EEOC more than six months after the expiration of the 180 day period of limitations provided for by the Civil Rights Act of 1964, 42 U.S.C. §2000E-5(e). The claim was dismissed by EEOC as untimely. In December of 1973, plaintiff began an action in the United States District Court, Southern District of New York, seeking relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 *et seq.*

Defendants alleged, in their answer, that plaintiff had failed to comply with the jurisdictional prerequisites of Title VII. Defendants' defense was sustained upon motion for summary judgment and the complaint was dismissed by Judge Owen. Plaintiff appealed.

In *Kenil K. Goss v. Revlon, Inc.*, 548 F.2d 405, decided October 29, 1976, the Second Circuit, in a per curiam opinion, decided the appeal by plaintiff from Judge Owen's order granting defendants' motion to dismiss the complaint which alleged employment discrimination under the Civil Rights Act of 1964, 42 U.S.C. §2000(e) *et seq.* The order granting defendants' motion to dismiss the complaint was affirmed by the Second Circuit. Plaintiff had also moved in the district court for leave to amend his complaint to add new causes of action, under the Civil Rights Act of 1866, the Civil Rights Act of 1870, the Age Discrimination in Employment Act, the Thirteenth Amendment and sought class action status. The Second Circuit held that the district court failed to rule on plaintiff's motion for leave to amend to add new causes of action. The case was remanded to the district court for a determination of plaintiff's motion, only with respect to the cause of action under the Civil Rights Act of 1866, 42 U.S.C. §1981, since the court held the other claims to be without merit. Plaintiff thereafter petitioned the Second Circuit for rehearing and that petition was denied on December 20, 1976.

Upon remand, Judge Owen denied *nunc pro tunc*, plaintiff's motion for leave to amend to assert a claim under 42 U.S.C. §1981.

Plaintiff appealed once again. In *Kenil K. Goss v. Revlon, Inc.*, Docket No. 76-7614, decided April 29, 1977, the Second Circuit affirmed the order of the district court denying plaintiff leave to amend to add a cause of action under 42 U.S.C. §1981. The Second Circuit found "no abuse of discretion in the district court's denial of leave to amend."

A petition for rehearing was denied by the Second Circuit on June 7, 1977.

In its first decision, the Second Circuit referred to plaintiff's "extended and undue delay" and in its second decision, the court referred to plaintiff's "long delay" in seeking to amend his complaint.

On November 28, 1977, the United States Supreme Court denied plaintiff's petition for a writ of certiorari.

On December 12, 1977, plaintiff filed the complaint herein, a copy of which was served upon defendants on or about December 15, 1977.

ARGUMENT

I.

There is no issue warranting review on certiorari.

As Judge Frankel stated in his opinion below, plaintiff "can fare no better on this round than he has in the past, for the claim he asserts is time-barred." (Appendix E, 10a).

Plaintiff's employment by defendant USV was terminated in March of 1972. There is no dispute as to this issue and, in fact, the Second Circuit so held in *Goss v. Revlon, Inc.*, 548 F.2d 405, 406 (2nd Cir. 1976).

The Second Circuit has ruled that "the applicable statute of limitations in a federal civil rights case brought in New York is the three years provided in N.Y. CPLR §214(2) — liability based on a statute." *Thomas Kaiser v. Cahn*, 510 F.2d 282, 284 (2nd Cir. 1974); *Goss v. Revlon, Inc., id.* at page 407.

In *Martin Hodes, East Coast Cinematics, Inc. v. Lindsay*, 431 F. Supp. 637 (S.D.N.Y. 1977), the court granted a motion

for summary judgment dismissing a federal civil rights action against various state and city officials. The court held that the complaint was time-barred under N.Y. CPLR §214(2) which "is clearly the most appropriate statute to apply here." *See also, Cestaro v. Mackell*, 429 F. Supp. 465 (E.D.N.Y. 1977).

The complaint herein was filed by plaintiff on December 12, 1977. Accordingly, only acts which occurred after December 12, 1974 would be actionable. All of the events which relate to the termination of plaintiff's employment precede that date. Since plaintiff's employment was terminated in March of 1972, the cause of action asserted in the complaint is time-barred.

II.

There is no conflict with the decisions of this Court.

Plaintiff argues that the New York statute of limitations has been tolled by virtue of his filing a claim with EEOC in 1973 or by his instituting a Title VII action in 1973. Plaintiff does not cite any applicable state or federal precedents which would support his contention. In fact, all of the applicable authority indicates that the New York statute has not been tolled.

In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S. Ct. 1716 (1975), the United States Supreme Court ruled that the timely filing of an employment discrimination charge with EEOC pursuant to Title VII of the Civil Rights Act of 1964 does not toll the running of the limitation period applicable to an action, based upon the same facts, brought under 42 U.S.C. §1981. Accordingly, where plaintiff Johnson waited over 3½ years after his cause of action for racial employment discrimination accrued before instituting an action under §1981 that suit was time-barred by the one year limitation imposed by Tennessee law, notwithstanding that Johnson had filed the Title VII charge before that one year period expired.

The Supreme Court expressly noted that the filing of a Title VII claim was not a prerequisite to bringing a §1981 action, and that the two avenues of relief were independent. The Court stated at 95 S. Ct. page 1720:

> "*We generally conclude, therefore, that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent.*" (Emphasis supplied.)

Again at 95 S. Ct. page 1723, the Court reiterated the independence of the two remedies as follows:

> "But the fundamental answer to petitioner's argument lies in the fact — presumably a happy one for the civil rights claimant — that Congress clearly has retained §1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII. Petitioner freely concedes that he could have filed his § 1981 action at any time after his cause of action accrued; in fact, we understand him to claim an unfettered right so to do. Thus, in a very real sense, petitioner has slept on his §1981 rights. The fact that his slumber may have been induced by faith in the adequacy of his Title VII remedy is of little relevance inasmuch as the two remedies are truly independent."

III.

There is no conflict among the circuits.

As stated by Judge Frankel, plaintiff appears to acknowledge that his contention must founder under the *Johnson* rule but argues that the rule announced by the Supreme

Court in *Johnson* cannot be applied retroactively (Appendix E, 12a). This argument has been rejected by numerous courts. *Cates v. Trans World Airlines, Inc.*, 561 F.2d 1064, 1972-74 (2nd Cir. 1977); *Williams v. Phil Rich Fan Mfg. Co., Inc.*, 552 F.2d 596 (5th Cir. 1977); *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976); *Greene v. Carter Carburetor Co.*, 532 F.2d 125 (8th Cir. 1976).

IV.

There is no constitutional question.

Plaintiff offers no equitable considerations to support his contention that the statute of limitations has been tolled.

In *Meyer v. Frank*, 409 F. Supp. 1240 (E.D.N.Y. 1976), *affirmed*, 550 F.2d 726 (2nd Cir. 1977), the court granted a motion to dismiss a federal civil rights action because such action was brought more than three years after discharge. The court held that the New York three year statute of limitations was not tolled by the plaintiff's institution of Article 78 proceedings in the state courts to set aside their removals.

In *Meyer v. Frank*, 550 F.2d 726 (2nd Cir. 1977), the Second Circuit considered the policy of federal law which might toll the statute in light of state statute of limitations policy and the plaintiff's conduct of the litigation. In affirming the district court's dismissal of the complaint, the court held that federalism considerations were of "insufficient substance to outweigh the statute of limitations policy so directly brought to bear by the facts of this case." *Id.* at page 730. The court also noted that "lack of diligence weighs heavily against Meyer."

Lack of diligence must weigh heavily against plaintiff herein.

In *Goss v. Revlon, Inc., supra*, the Second Circuit referred to plaintiff's "extended and undue delay." Again, in *Goss v.*

Revlon, Inc., Docket No. 76-7614, decided April 29, 1977, the court referred to plaintiff's "long delay in seeking to file his amended complaint."

In *International Union of Electrical Workers v. Robbins & Myers*, 97 S. Ct. 441 (1978), plaintiff urged that equitable tolling principles should be applied during the completion of grievance procedures under a collective bargaining agreement. The Supreme Court reaffirmed *Johnson*, and held that the limitation period was not tolled.

Plaintiff's conduct of this entire litigation since 1973 has been permeated by delay and the state policy of limitations as set forth in CPLR §214(2) should be applied.

Since December of 1973, plaintiff has made innumerable motions, and has filed in the circuit court three appeals and three petitions for rehearing, all of which have been without merit. He has abused his status as a *pro se* litigant to malign the trial judge, the attorneys for respondents and every person who has opposed his groundless claim. Accordingly, this Court should finally end this litigation by denying certiorari.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

s/ David Greene
Attorney for Defendants-Respondents

Martin C. Greene
Of Counsel